

RESTRICTED

Executive Registry
0-8817

OGC Has Reviewed*6 Feb 1950*

The Honorable Lindsay C. Warren
Comptroller General
General Accounting Office
Washington 25, D. C.

Dear Mr. Warren:

Enclosed herewith is a request from the [REDACTED] for relief from the assessment of liquidated damages under Contract [REDACTED] with this Agency. [REDACTED] the only bidder after advertisement by circular letter and public notice on a contract executed 4 May 1949. The contract provides for the delivery of [REDACTED] units for [REDACTED] rs. Two preliminary models were to be constructed and submitted to the Government within 60 days from the date notice of award was placed in the mail, and delivery of the remaining 98 units was to be made within 60 days from date of formal acceptance of the preliminary models. ARTICLE 6 of the contract contains a "Delays-Liquidated Damages" clause which provides that "the contractor shall not be charged with liquidated damages or any excess cost when the delay in delivery is due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to acts of God or the public enemy, acts of the Government, fires, flood, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, and delays of a subcontractor due to such causes unless the contracting officer shall determine that the materials or supplies to be furnished under the subcontract are procurable in the open market."

Notice of award of the contract was made on 12 May 1949 and 2 prototype models were received on 24 June. One of these units was found to be unsatisfactory and was returned to the contractor for correction. Time for delivery expired on 12 July. On 13 July, the contractor was notified of the assessment of liquidated damages on the one undelivered unit. On 3 August, the contractor was notified of the acceptance of both prototype models and requested to proceed with production of the balance of 98 units.

By letter dated 3 November, the contractor notified the Agency that the delivery date of 2 October for the remaining 98 models had been exceeded because a component part obtained from a subcontractor had proved unsatisfactory and the units had to be refabricated after the part was replaced. Contractor then requested waiver of the provisions of ARTICLE 6 in regard to liquidated damages. He was advised by letter of 16 November that the Agency could not legally waive the requirement of liquidated damages. Delivery of the additional units was completed on 18 November.

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In three letters dated 3 November, 14 and 29 December 1949, the contractor has requested relief on contentions that the liquidated damage provision is a penalty, that there is no provable damage to the Government, and that the failure of the subcontractor to provide a satisfactory component part was an "unforeseeable cause" which would relieve him of liability under ARTICLE 6.

Although assessed liquidated damages amounting to \$1,782.00 on a contract whose total value is \$2,200.00 less discount of 1% - 10 days, may appear disproportionate, it is our understanding that the relationship between the assessed liquidated damages and the actual damages sustained by the Government as the result of such delay is not a proper matter for consideration in determining the possible invalidity of such a stipulation as an unenforceable penalty. Reference is made to your opinion, 21 Comp. Gen. 529,635, in which you state that: "In the determination of such question, the only matter open for consideration is the relation between the amount stipulated as liquidated damages, and the losses which were in contemplation between the parties when the contract was made; and in order for a provision for liquidated damages to be overturned on the ground that it constitutes a penalty, the record must show conclusively that there was no possible relation between the amount stipulated for liquidated damages and the losses which were contemplated by the parties at the time the contract was made." And, in 28 Comp. Gen. 435, 437: "Nor is it material to the legality of such a provision that in a particular case no actual damage can be shown to have resulted from the breach." I, therefore, believe the provision is valid and that proof of actual damage is unnecessary.

In support of his assertion that liquidated damages should not be assessed, the contractor then relies primarily on the point that failure of the subcontractor to produce a properly functioning component part was an "unforeseeable cause" beyond his control. Reference is made to your opinion in 23 Comp. Gen. 25, 27 in which you state:

"Hence, there now can be no doubt that, in order for an act of the Government to be classed as an excusable cause for failure to perform properly under a contract such as here involved, it first must be established that the act was so abnormal, extraordinary, or unusual, that it reasonably could not have been foreseen and provided against in the contract."

I do not believe that the failure of the subcontractor was an "unforeseeable cause" which could not have been anticipated by the contractor in the normal course of business. Nor, as I have indicated above, do I believe that the delays clause was inherently illegal or that its inclusion in the contract was improper. However, there are certain mitigating aspects of the situation which I believe deserve consideration. The contractor has been completely cooperative at all times. I have no doubt that he made every effort to produce a satisfactory end-unit within the stipulated delivery time and that the delay was due solely to the primary

deficiency in the product of the subcontractor. The fact that the subcontractor was the only source of supply - while not a cognizable reason for a legal escape - is another factor that commands attention from an equitable viewpoint. Although the damages assessed conform to the contract requirements, I do not - as a matter of fact - believe that full assessment is fair and just when all aspects of the case are reviewed. For these reasons I am forwarding the contractor's request with a recommendation that you remit to the contractor under the authority of Section 3 (a) of the Central Intelligence Agency Act of 1949 (P.L. 110 - 81st Cong.) which incorporates by reference the authority contained in the Armed Services Procurement Act of 1947, Title 41 USCA, Section 185, so much of the liquidated damages as are not in excess of 10% of the contract price.

In view of the classification of the contract as "restricted", since there is a security element present in procurement of this type for the Agency, it would be appreciated if your opinion and comments could be confined to the Agency and not published.

Sincerely yours,

R. H. Hillenkoetter
Rear Admiral, USN
Director of Central Intelligence

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ihw

cc: Subject ✓
Chrono
Signer's copy
Central Records
Return to OGC dated

Cc. [REDACTED]

Typed Jan. 31, 1950

Cc. [REDACTED]

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Attachments:

1. Ltr to CIA fr UTC dtd Dec 29, 1949
2. Ltr to UTC fr T. K. Strange dtd 18 Dec 1949
3. Ltr to CIA fr UTC dtd Dec 14, 1949
4. Ltr to UTC fr T. K. Strange dtd 16 Nov 1949
5. Ltr to CIA fr UTC dtd Nov 3, 1949
6. Ltr to UTC fr Services Officer dtd 2 Aug 1949
7. Ltr to UTC fr Services Officer dtd 13 July 1949
8. Ltr to UTC fr Supply Division dtd May 4, 1949
9. Statement and Certificate of Award dtd 3 May 1949
10. Contract for Supplies dtd May 4, 1949